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## Overcoming the Surge: How *Clark v. City of Seattle* Highlights the Conflicts Between Federal, State, and Local Labor Laws

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# Overcoming the Surge: How *Clark v. City of Seattle* Highlights the Conflicts Between Federal, State, and Local Labor Laws

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## INTRODUCTION: FIRST DAY ON THE JOB

In September 2015, Steve Lopez, a *Los Angeles Times* reporter, opened the Uber app for the first time and embarked on his first day as an Uber driver.<sup>1</sup> After a moment of the “rookie jitters,” Steve picked up his first customer, Eloisa Lopez, whose destination was downtown Los Angeles.<sup>2</sup> On his first day, Steve drove from 9 a.m. until 5 p.m. and again after 9 p.m.<sup>3</sup> He drove a singer, several songwriters, a therapist, a radio executive, and a University of Southern California graduate.<sup>4</sup> His patrons were enthusiastic about the convenience of Uber because it allowed them to drink without worrying about driving, arrive at their destinations without searching for parking, and pay electronically without needing cash.<sup>5</sup> Steve, however, was not as satisfied as his customers. He broke down his earnings for the day and found that he made only \$12.22 an hour after deducting Uber’s cut of the fares and the cost of gas.<sup>6</sup> The total did not account for the cost of car insurance or the wear and tear on his car.<sup>7</sup> Steve ultimately decided that Uber was great for passengers but “yet another industry that might one day make a few people staggeringly rich on the backs of workers who struggle to eke out a living wage[.]”<sup>8</sup>

Recently, the American workforce has shifted toward a new demand for “gig workers,” like Uber and Lyft drivers, who use smartphone applications to engage in on-demand services.<sup>9</sup> The MBO Partners, a privately owned business that assists independent contractors and those that employ them,<sup>10</sup> created an Independent Workforce Index to track the

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1. Steve Lopez, *After Driving for Uber, he’s keeping his day job*, L.A. TIMES (Sept. 19, 2015), <http://www.latimes.com/local/california/la-me-0920-lopez-uber-20150920-column.html> [<https://perma.cc/4U88-6K8V>].

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. SARAH A. DONOVAN, DAVID H. BRADLEY & JON O. SHIMABUKURO, WHAT DOES THE GIG ECONOMY MEAN FOR WORKERS? (Cong. Research Serv. 2016).

10. *About MBO Partners*, MBO PARTNERS, <http://www.mbopartners.com/about> [<https://perma.cc/E8R8-NANV>] (last visited Feb. 7, 2019). The MBO Partners was created to assist independent contractors and businesses that employ independent contractors in building and maintaining successful work relationships. Part of MBO Partners’ mission statement is to see most of

gig worker sector's growth and reported that the number of gig workers rose by 8.2% in 2011, 2.7% in 2012, and is expected to increase.<sup>11</sup> As of 2016, there were 3.8 million gig workers in America.<sup>12</sup> The MBO Partners describe the rise of gig-related jobs as a "structural shift" in the workforce rather than "a blip[] in the jobs economy."<sup>13</sup> These gig workers, including the rideshare industry, are part of an emerging job market here to stay.<sup>14</sup>

Debate surrounds whether the government should classify gig workers as employees or independent contractors under the National Labor Relations Act ("NLRA") and other laws.<sup>15</sup> The NLRA governs the collective bargaining rights of workers classified as employees but excludes workers classified as independent contractors from coverage.<sup>16</sup> If the NLRA considers rideshare drivers employees, they can engage in collective bargaining and file unfair labor practice charges under the NLRA to contest an employer's unilateral decisions.<sup>17</sup> If rideshare drivers are considered independent contractors, they cannot engage in these actions.<sup>18</sup> Instead,

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America's workforce shift towards self-employment. The MBO Partners' research on gig workers has been published and cited in *Fortune*, the *Washington Business Journal*, and *Forbes*. *Id.*

11. MBO Partners, *The State of Independence in America*, THIRD ANNUAL INDEPENDENT WORKFORCE REPORT 4 (Sept. 2013), [https://www.mbopartners.com/uploads/files/state-of-independence-reports/2013-MBO\\_Partners\\_State\\_of\\_Independence\\_Report.pdf](https://www.mbopartners.com/uploads/files/state-of-independence-reports/2013-MBO_Partners_State_of_Independence_Report.pdf) [<https://perma.cc/LHE3-5AJF>] (noting that the number of gig workers "rose yet again: up 2.7% over 2012 and 8.2% over the base year 2011").

12. Rani Molla, *The gig economy workforce will double in four years*, RECODE (May 25, 2017, 12:27 PM), <https://www.recode.net/2017/5/25/15690106/gig-on-demand-economy-workers-doubling-uber> [<https://perma.cc/MX4V-CDEU>] ("9.2 million Americans are expected to work in the gig economy by 2021 . . .").

13. MBO Partners, *supra* note 11, at 4.

14. *See id.*

15. Jimmy Frost, *Uber and the Gig Economy: Can the Legal World Keep Up?*, 13 No. 2 ABA SCITECH LAW. 4, 5 (Winter 2017).

16. National Labor Relations Act, 29 U.S.C. § 152 (2012).

17. *See generally id.*

18. *See generally id.* § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .").

rideshare drivers would have to organize and attempt to make workplace changes without NLRA protections and regulations.<sup>19</sup>

Courts and Congress have failed to properly clarify on drivers' status, so drivers' labor rights are subject to labor regulations that vary from city to city and state to state,<sup>20</sup> leaving many workers without protection.<sup>21</sup> If drivers work in a city that does not allow rideshare workers to unionize, the drivers must depend on themselves, rather than a union, for protections against pay changes, terminations, and unilateral employer decisions.<sup>22</sup>

A recent case from a federal district court in Washington, *Clark v. City of Seattle*, highlights the conflicts that occur among federal, state, and local labor laws when a city permits rideshare drivers, who may be classified as independent contractors, to unionize.<sup>23</sup> *Clark* focused on a Seattle ordinance that circumvented the classification debate and declared rideshare drivers classified as independent contractors can unionize and engage in collective bargaining.<sup>24</sup> The solution to the independent contractor–employee debate, therefore, is not relevant in Seattle because either classification results in the same protection of rights to organize and

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19. *Id.* Organizing and bargaining is possible without NLRA coverage, but it is a difficult and sometimes impossible process because independent contractors lack NLRA regulations and protections that force the process along. For example, public sector employees—also excluded from NLRA coverage—make up public sector unions, but there are major restrictions to the bargaining abilities depending on the state. *See, e.g.,* Garrett Epps, *Will the Supreme Court Unravel Public Employee Unions?*, ATLANTIC (Oct. 3, 2017), <https://www.theatlantic.com/politics/archive/2017/10/will-the-supreme-court-unravel-public-employee-unions/542382/> [<https://perma.cc/WNW3-2NWH>].

20. *See generally* SEATTLE, WA., MUN. CODE ch. 6.310, § 1(A) (2015). This classification issue also arises under other state and federal labor and employment laws, such as the Fair Labor Standards Act. *See generally* Fair Labor Standards Act, 29 U.S.C. § 202 (2012).

21. *See generally* MUN. ch. 6.310, § 1(A). The ordinance allows rideshare drivers to unionize and drivers working in cities other than Seattle do not have the same labor protections from employers. *Id.*

22. *See, e.g.,* Complaint at 6–9, *Van v. Rasier, L.L.C.*, No. 2:17-CV-02550, 2017 WL 1278763 (C.D. Cal. Sept. 14, 2017).

23. *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at \*1 (W.D. Wash. Aug. 24, 2017).

24. *Id.* The city of Seattle foreshadowed that the classification debate in the courts and Congress will result in rideshare drivers being classified as independent contractors. The classification debate has not been solved, but Seattle gave unionization and collective bargaining protections to rideshare drivers in the event they are classified as independent contractors. *Id.*

bargain collectively.<sup>25</sup> The NLRA does not preempt local regulation such as the Seattle Ordinance because independent contractors are excluded from the NLRA's scope.<sup>26</sup> Thus, local ordinances that regulate rideshare drivers' collective bargaining rights allow cities to decide for themselves whether rideshare workers can unionize.<sup>27</sup>

Federal regulation of rideshare workers' collective bargaining rights would create uniformity and provide important protections for a growing sector of the American workforce.<sup>28</sup> The NLRA's current definition of "employee" does not include rideshare drivers, but Congress should amend the definition to categorize all gig workers as employees.<sup>29</sup> The amendment should have two aims: (1) to recognize rideshare drivers as a modern part of the American workforce; and (2) to provide regulation for drivers' collective bargaining rights.<sup>30</sup> Until the NLRA definition of employee encompasses gig workers, the regulation of rideshare drivers will be left to local or state governments—and as a result,<sup>31</sup> inconsistent labor protections and unpredictable markets for rideshare drivers.<sup>32</sup> National companies, like Uber, will have to accommodate for changed regulations to avoid litigation or federal and state action, but uniformity overcomes these variations in the law, replacing confusion with certainty across the board.

This Comment addresses the advantages of regulating gig workers, specifically rideshare drivers, at the federal level and demonstrates how an amendment to the NLRA accomplishes that regulation. Part I explains the relevant NLRA provisions, focusing on the history of the classification debate surrounding rideshare drivers and the related balance between federal, state, and local labor laws. Part II presents *Clark v. City of Seattle*, the case challenging the Seattle Ordinance, and analyzes *Clark* in light of a current circuit split. Part III discusses the possible NLRA preemption of the Seattle Ordinance. Part III also suggests that Congress amend the NLRA's employee definition to include gig workers and allow collective

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25. *Id.*

26. 29 U.S.C. § 152 (2012).

27. *See generally* SEATTLE, WA., MUN. ch. 6.310, § 1(A) (2015).

28. Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 132–50 (2008).

29. *See generally* 29 U.S.C. § 152.

30. *See, e.g.*, Council Directive 2008/104, art. 1, 2008 O.J. (L 327) (EC).

31. *See generally* MUN. ch. 6.310, § 1(A).

32. *Id.* Seattle rideshare drivers have labor protections that drivers in cities without regulations do not. *But see* Council Directive 2008/104, art. 1, 2008 O.J. (L 327) (EC) (addressing drivers on the federal level creates uniform protections for drivers regardless of the city they work in).

bargaining of gig workers to be regulated at the federal level. This Comment concludes by advocating for an amendment to the NLRA that provides necessary federal regulation of rideshare drivers' collective bargaining rights.

## I. THE CLASSIFICATION DILEMMA

The classification debate begins with the delicate balance of federal, state, and local labor laws.<sup>33</sup> Federal labor laws preempt local regulation when Congress determines the federal interest in having consistent governance of employer–employee relationships is greater than the state or local government interest in regulating labor rights.<sup>34</sup> Labor law preemption is a primarily court-made doctrine, so court interpretations of preemption are essential to determine the balance between federal, state, and local labor laws.<sup>35</sup>

### A. History of the NLRA

In 1935, Congress passed the NLRA, giving itself the power to regulate the collective bargaining rights of employees.<sup>36</sup> Collective bargaining is the method labor organizations and employers use to negotiate the terms and conditions of employment, including pay and wage, group insurance, seniority benefits, and overtime.<sup>37</sup> Congress enacted the NLRA to encourage collective bargaining between employers

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33. Theresa L. Corrada & Roberto L. Corrada, *Federal Preemption of State Employment Laws and Claims*, in 16 COLO. PRAC., EMPLOYMENT LAW & PRACTICE § 14.7 (3d ed.).

34. San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon (*Garmon*), 359 U.S. 236, 244 (1959) (“When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.”).

35. Corrada & Corrada, *supra* note 33. The NLRA does not explicitly state the parameters of labor law preemption. “Unlike ERISA preemption, which is based on express statutory law, preemption of state law by federal labor laws is a combination of statutory preemption and court-made doctrine.” *Id.*

36. 29 U.S.C. § 151 (2012). Collective bargaining “is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.” *Id.* § 158(d).

37. TERRY L. LEAP, COLLECTIVE BARGAINING AND LABOR RELATIONS 7 (1991).

and employees and to protect workers' "freedom of association."<sup>38</sup> The NLRA's intent was "to resolve differences [between employers and employees]—to compromise—rather than to engage in protracted combat."<sup>39</sup> The NLRA also seeks to protect employees who do not wish to engage in collective bargaining.<sup>40</sup> The NLRA regulates collective bargaining and ensures that employers do not interfere with employees' right to join a labor organization.<sup>41</sup>

Section 2 of the NLRA defines a labor organization as an organization that exists to address employee grievances with their employers.<sup>42</sup> A union is a type of labor organization that organizes employees and facilitates conversations with employers about working conditions, and workers join unions to engage in collective bargaining.<sup>43</sup> Although unions serve as the most popular avenue for collective bargaining, the U.S. Court of Appeals for the Seventh Circuit in *Electromation v. NLRB* held that the term "labor organization" has been broadly construed to include any group that organizes for purposes of "'dealing with' the employer."<sup>44</sup> In *Electromation*, the court concluded that action committees the employer created qualified as labor organizations under the broad construction of the definition Congress promulgated.<sup>45</sup>

In addition to defining a labor organization, § 2 defines workers that fall within NLRA coverage.<sup>46</sup> It regulates and protects employees, circularly defining employees as "any employee" and making it difficult to determine who is classified as an employee.<sup>47</sup> The NLRA's employee exclusions, however, are helpful.<sup>48</sup> The NLRA specifically defines what an employee is not: "The term 'employee' . . . shall not include . . . any

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38. 29 U.S.C. § 151. Freedom of association means an employee's right to join or not join a group that advocates for labor rights. *Id.*

39. HAROLD W. DAVEY ET AL., CONTEMPORARY COLLECTIVE BARGAINING 32 (1951).

40. *Id.* at 41 ("[F]ederal law has also sought to protect employees in their right to refrain from self-organization and collective bargaining if they so desire.").

41. 29 U.S.C. § 157.

42. *Id.* § 152(5) (A labor organization is "any organization of any kind . . . in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

43. DAVEY ET AL., *supra* note 39.

44. *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1159 (7th Cir. 1994).

45. *Id.*

46. 29 U.S.C. § 152.

47. *Id.*

48. *Id.* § 152(3).



individual having the status of an independent contractor . . . .”<sup>49</sup> This defined exclusion removes a significant group of workers from NLRA coverage.<sup>50</sup>

In response to the vague definition of employee, courts have developed several tests to distinguish between independent contractors and employees.<sup>51</sup> There is no concrete distinction between the classifications, but most jurisprudential tests revolve around the level of employer control.<sup>52</sup> In *NLRB v. United Insurance Co. of America*, the United States Supreme Court applied the common law agency test that focuses on the employer’s control over the worker’s everyday life and held that debt agents were employees rather than independent contractors under the NLRA.<sup>53</sup> In a 2017 case, *Minnesota Timberwolves Basketball*, the National Labor Relations Board (“NLRB”)<sup>54</sup> reaffirmed the common law agency test and held that crew members for a basketball team were employees rather than independent contractors because their employer exercised considerable control over their work, and the crew members did not have any proprietary interest in the team.<sup>55</sup> The NLRB, which has jurisdiction to establish tests that concern labor rights, restated that the common law agency test is based on the Restatement (Second) Agency factors, such as skill required, control, and method of payment, with no

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49. *Id.*

50. *Id.*

51. See *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995, 1000 (8th Cir. 2015); *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1318 (11th Cir. 2015); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

52. See *Gray*, 799 F.3d at 1000; *Carlson*, 787 F.3d at 1318; *United Ins. Co. of Am.*, 390 U.S. at 256.

53. *United Ins. Co. of Am.*, 390 U.S. at 256 (holding that the debt agents were employees because the debt agents did not have a large amount of decision making authority; the debt agents performed tasks as part of the company’s normal operations, the agents were trained by company personnel, and the debt agents did business under the company’s name).

54. The National Labor Relations Board is the five-member body that governs labor rights. When a case begins, the Regional Director investigates the claim and can either report it to an administrative law judge or dismiss the claim. The administrative law judge then has a formal trial and rules on the claim. The NLRB hears any appeals, and U.S. courts of appeal hear the appeals from the NLRB’s decision, with the Supreme Court acting as the last step in the appeal process. See *The NLRB Process*, NLRB, <https://www.nlr.gov/resources/nlr-process> [<https://perma.cc/DK2L-LUQJ>] (last visited Feb. 7, 2019).

55. *Minn. Timberwolves Basketball, LP & Int’l All. of Theatrical Stage Emp.*, 365 N.L.R.B. 124 (2017).

factor standing alone.<sup>56</sup> These jurisprudential tests are necessary in the classification debate because neither Congress nor the Supreme Court has applied the test to gig workers.

Even more recently, a judge applied a similar control test to GrubHub drivers in a California district case.<sup>57</sup> In *Lawson v. GrubHub, Inc.*, a California judge for the Northern District of California held that GrubHub's employer correctly classified delivery drivers as independent contractors.<sup>58</sup> The judge applied the *Borello* test<sup>59</sup> to determine employee or independent contractor status, which includes a variety of secondary factors such as method of payment and scheduling, but primarily focused on the control the worker-drivers have over their duties.<sup>60</sup> Ultimately, the judge held that Lawson, a GrubHub delivery driver, was an independent contractor because he had control over his schedule, and GrubHub exhibited very little control over where, when, and how Lawson chose to make his deliveries.<sup>61</sup> Similarly, courts would likely classify rideshare drivers as independent contractors under the *Borello* test because rideshare drivers are engaged in a very similar type of work as GrubHub delivery drivers.<sup>62</sup>

### *B. The New Kind of Worker*

Gig workers are part of a new American workforce that provide services to consumers on a job-or-gig basis and have sparked much debate about their NLRA classification.<sup>63</sup> The Congressional Research Service described a "gig worker" as someone who answers on-demand service calls from customers using technology-based apps on smartphones.<sup>64</sup> The

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56. *Id.* See also RESTATEMENT (SECOND) OF AGENCY § 220 (AM. LAW INST. 1958).

57. *Lawson v. GrubHub, Inc.*, No. 15-CV-05128-JSC, 2017 WL 1684964, at \*1 (N.D. Cal. May 3, 2017).

58. *Id.*

59. *S. G. Borello & Sons, Inc. v. Dep't of Indus. Relations*, 48 Cal. 3d 341, 350–51 (1989). To determine whether a worker is an employee or an independent contractor, the Supreme Court of California adopted a multi-factor test that centers around the element of control. *Id.* at 354–59. The court determines who has the "right to control the work." *Id.* at 354.

60. *Lawson*, 2017 WL 1684964, at \*1.

61. *Id.*

62. *Id.*

63. Frost, *supra* note 15.

64. John Utz, *What Is A "Gig"? Benefits for Unexpected Employees*, PRAC. LAW. 19, 20 (June 2016), [http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/TPL1606-Utz\\_thumb.pdf](http://files.ali-cle.org/thumbs/datastorage/lacidoirep/articles/TPL1606-Utz_thumb.pdf) [<https://perma.cc/Y3HG-HMYD>].

U.S. Supreme Court has yet to rule on the classification of Uber and Lyft drivers,<sup>65</sup> and the lower courts have struggled to categorize drivers because gig workers are unique and new.<sup>66</sup> Employee status gives rideshare drivers NLRA collective bargaining rights, but independent contractor status does not.<sup>67</sup> Independent contractor status requires that rideshare drivers negotiate with employers on their own.<sup>68</sup> Most rideshare companies, including Uber and Lyft, consider drivers to be independent contractors.<sup>69</sup>

The rideshare companies benefit if drivers are independent contractors because the companies can change contract terms—such as pay, surge times, and commission—at will.<sup>70</sup> An Uber driver in a recent California district court case alleged that Uber unilaterally imposed an “upfront pricing model” in 2017 that calculated longer routes for drivers, which resulted in a bigger cut for Uber.<sup>71</sup> For example, Uber advertises that it takes around 25% of the fare, but one driver tracked his fares and concluded that Uber takes up to 54% at times.<sup>72</sup> A rideshare company can even deactivate a driver from the Uber application, which effectively eliminates a source of income.<sup>73</sup> If drivers are classified as employees under the NLRA, collective bargaining rights would enable them to engage in negotiations with rideshare companies to discuss pay, surge times, commission, and termination issues through unions serving as their collective bargaining representatives.<sup>74</sup> Without collective bargaining, the

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65. Pamela A. Izvanariu, *Matters Settled but Not Resolved: Worker Misclassification in the Rideshare Sector*, 66 DEPAUL L. REV. 133, 172 (2016).

66. Frost, *supra* note 15.

67. 29 U.S.C. § 152 (2012).

68. See, e.g., FREELANCERS UNION, <https://www.freelancersunion.org/> [https://perma.cc/EBA6-M962] (last visited Feb. 7, 2019).

69. Ryan B. Frazier, *Sharing is caring: Are Uber, Lyft Drivers independent contractors?*, UTAH EMP. L. LETTER (Oct. 14, 2016, 5:00 AM), <https://www.kmclaw.com/newsroom-articles-367.html> [https://perma.cc/E7JB-MN8S].

70. Natasha Singer, *In the Sharing Economy Workers Find Both Freedom and Uncertainty*, N.Y. TIMES (Aug. 16, 2014), <https://www.nytimes.com/2014/08/17/technology/in-the-sharing-economy-workers-find-both-freedom-and-uncertainty.html> [https://perma.cc/8DKT-QHCL].

71. Complaint at 6–8, *Van v. Rasier*, L.L.C., No. 2:17-CV-02550, 2017 WL 1278763 (C.D. Cal. Sept. 14, 2017).

72. Harry Campbell, *What's the Real Commission that Uber Takes From Drivers*, MAXIMIZING RIDESHARE PROFITS BLOG (July 25, 2016), <https://maximuridesharingprofits.com/whats-real-commission-uber-takes-drivers/> [https://perma.cc/JT87-ZLKN].

73. Singer, *supra* note 70.

74. 29 U.S.C. § 152 (2012).

drivers must rely on their individual contract negotiations with rideshare companies as opposed to a powerful group effort.<sup>75</sup>

*C. Seattle's Ordinance: The First of Its Kind*

Reporters describe Seattle's Ordinance 124968 ("Seattle Ordinance" or "Ordinance") as the "first of its kind" because it goes beyond the scope of the NLRA and specifically protects for-hire drivers despite their independent contractor status.<sup>76</sup> In December 2015, Seattle passed the Ordinance, which gave rideshare drivers who are independent contractors<sup>77</sup> the right to engage in collective bargaining and created an avenue for them to form bargaining units to negotiate for payment increases, vehicle safety, and driver input on employer decisions.<sup>78</sup> Seattle passed the Ordinance at a time of intense nationwide debate between employers and workers regarding whether rideshare drivers should be considered independent contractors or employees for union organization purposes.<sup>79</sup> Seattle passed the Ordinance as a part of its power to regulate transportation within the city and to "protect the public health, safety, and welfare . . . [by] ensur[ing] safe and reliable transportation services."<sup>80</sup> The Seattle Ordinance does not classify drivers as independent contractors; instead, it simply states that those drivers whom the Supreme Court or

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75. *Collective Bargaining*, ALF-CIO, <https://aflcio.org/what-unions-do/em-power-workers/collective-bargaining> [<https://perma.cc/7KAX-LP7U>] (last visited Feb. 7, 2019).

76. Jon Steingart, *Seattle Law Allowing Uber, Lyft Drivers to Unionize Is Blocked*, DAILY LAB. REP. (Aug. 29, 2017), <https://www.bna.com/seattle-law-allowing-n73014463849/>; Lisa Milam-Perez, *Seattle's Uber organizing ordinance enjoined for now*, EMP. L. DAILY, <http://www.employmentlawdaily.com/index.php/news/seattles-uber-organizing-ordinance-enjoined-for-now/> [<https://perma.cc/SFA8-9VD3>] (last visited Feb. 7, 2019).

77. *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at \*4 (W.D. Wash. Aug. 24, 2017). The Ordinance did not declare that rideshare drivers are independent contractors; instead, the Directive declares that drivers who are classified as independent contractors, either by the courts or Congress, can engage in collective bargaining. *Id.*

78. Seattle Medium, *City of Seattle Implementing For-hire Driver Collective Bargaining Law*, SEATTLE MEDIUM (June 17, 2016), <http://seattlemedium.com/city-seattle-implementing-hire-driver-collective-bargaining-law/> [<https://perma.cc/VN2T-LHQJ>].

79. Frost, *supra* note 15.

80. *Id.*

Congress may classify as independent contractors in the future can engage in collective bargaining.<sup>81</sup>

The Seattle Ordinance authorizes the Seattle Department of Finance and Administration Services to issue rules that govern these union organizing efforts.<sup>82</sup> Procedurally, the Director of Finance and Administrative Services, whom the Seattle mayor appoints, acts as the bargaining process coordinator to ensure that the bargaining agreement aligns with the city's goals.<sup>83</sup> The Ordinance further gives the Director the authority to send parties to arbitration when a violation occurs<sup>84</sup> and the ability to assess and enforce consequences for improper conduct.<sup>85</sup> The Seattle Ordinance highlights the continued need for clarity concerning Uber and Lyft drivers because it oversteps NLRA boundaries by classifying the drivers as independent contractors upfront.

## II. *CLARK V. CITY OF SEATTLE* STIRS THE POT

A group of for-hire drivers challenged the Seattle Ordinance by alleging it forced drivers into collective bargaining units and limited the drivers' freedom of speech.<sup>86</sup> The drivers filed suit in the United States District Court for the Western District of Washington and argued that the NLRA, the First Amendment, and the Drivers' Protection Privacy Act preempted the Seattle Ordinance—therefore, it was unconstitutional.<sup>87</sup>

The drivers filed suit after Teamsters Local 117 ("Teamsters"), a union that supports for-hire drivers,<sup>88</sup> notified rideshare companies of its intention to begin organizing the drivers and hopefully become their bargaining representative.<sup>89</sup> Unions such as Teamsters typically start the

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81. SEATTLE, WA., MUN. ch. 6.310, § 1(A) (2015).

82. *Id.* § 3(I)(3).

83. *Id.*

84. *Id.*

85. *Id.* § 3(M)(1).

86. Complaint at 3, *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908 (W.D. Wash. Aug. 24, 2017) ("[Ordinance 124968] deprives drivers of their freedom of speech and compels drivers to associate with an exclusive representative and its expressive activities . . .").

87. *Clark*, 2017 WL 3641908, at \*1.

88. RAISE UP UBER, <http://www.raiseupuber.org/> [<https://perma.cc/4BDN-5F5U>] (last visited Feb. 7, 2019).

89. *Clark*, 2017 WL 3641908, at \*1. The Department of Justice filed an amicus brief to *Chamber of Commerce v. City of Seattle* on November 3, 2017 arguing the Ordinance constitutes price fixing. In *Chamber of Commerce v. City of Seattle*, the Chamber of Commerce filed suit against Seattle arguing that federal law preempts the Ordinance and violates the Sherman Act's restriction on price

collective bargaining process by initiating a union-organizing campaign to gain enough support for a successful certification election.<sup>90</sup> The union must show that at least 30% of that employer's employees support the campaign to hold a certification election.<sup>91</sup> Teamsters thus sought the support of local drivers to hold a certification election.<sup>92</sup>

The plaintiff drivers argued that two sections of the NLRA—§§ 8(e) and 8(b)(4)—preempted the Seattle Ordinance because the Seattle Ordinance required drivers to unionize and would eventually force drivers to abide by a collective bargaining agreement.<sup>93</sup> Drivers may not want a collective bargaining agreement because it could alter their contract terms contrary to their wishes or force businesses to refuse their services if they are not part of the collective bargaining unit.<sup>94</sup> The first argument was based on NLRA § 8(e), which states that employers cannot enter into agreements that prevent the employees from engaging with “any other person.”<sup>95</sup> The district court rejected the § 8(e) argument because no harm had yet occurred.<sup>96</sup> Teamsters had not organized, meaning there was no union that drivers were being forced to join.<sup>97</sup>

The plaintiffs' second argument was that the Seattle Ordinance violated § 8(b)(4) because it forced the drivers to abide by a collective bargaining agreement.<sup>98</sup> Section 8(b)(4) states that “it [is] an unfair labor

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fixing. *See* Amicus Brief of Department of Justice, Chamber of Commerce of the U.S. v. City of Seattle, No. C16-0322RSL, 2016 WL 4595981, at \*1 (W.D. Wash. Aug. 9, 2016).

90. LEAP, *supra* note 37, at 135. A certification election is the process unions must go through to gain the right to represent a group of employees. Unions must show that at least 30% of employees have an interest in voting for the union as their representative. *Id.*

91. *Certification Election*, REP. PHIL. BUREAU LAB., <http://blr.dole.gov/ph/2014/12/11/certification-election/> [<https://perma.cc/7U7R-K9PB>] (last visited Feb. 7, 2019).

92. *Clark*, 2017 WL 3641908, at \*1.

93. *Id.*

94. *Id.* at \*2, \*6.

95. 29 U.S.C. § 158(e) (2012) (“It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable [sic] and void . . .”).

96. *Clark*, 2017 WL 3641908, at \*1.

97. *Id.*

98. *Id.*

practice for a labor organization to ‘threaten, coerce, or restrain any person engaged in commerce . . . .’<sup>99</sup> Although § 8(b)(4) does not require an agreement before a conflict arises, the court ruled that the conflict with the Seattle Ordinance was not ripe for suit because the drivers had not been “injured.”<sup>100</sup> It was unclear if Teamsters would unionize and what effect it would have if the drivers chose to join; therefore, the court reasoned the drivers had no cause of action.<sup>101</sup>

The court also struck down the plaintiffs’ argument that including independent contractors made the Seattle Ordinance unconstitutional.<sup>102</sup> Ultimately, the court based its decision on state law, but the court dismissed this argument because the controlling Ninth Circuit allowed the unionization of public employees, a group of workers the NLRA also excludes.<sup>103</sup> Notable, however, is the distinction between public employees and independent contractors—although independent contractors are specifically excluded from the definition of employee, the NLRA excludes public employees by excluding public employers rather than employees.<sup>104</sup> The groups are different, but the Washington court concluded the difference was irrelevant and dismissed the plaintiff’s preemption claim because the NLRA’s labor organization definition is “unambiguous.”<sup>105</sup> If the NLRA does not include or specifically excludes a group from NLRA protections, the NLRA does not preempt the regulation because the group does not constitute a labor organization.<sup>106</sup> Two days after the final judgment, the plaintiffs appealed to the Ninth Circuit.<sup>107</sup> On August 9, 2018, a three-judge panel for the Ninth Circuit affirmed the court’s ruling that the NLRA and First Amendment claims were not ripe for suit.<sup>108</sup>

*Clark* raises two important issues. The first is whether the NLRA preempts the Seattle Ordinance and the inherent conflicts between federal, state, and local labor laws that regulate independent contractors. The

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99. *Id.* at \*2 (citing 29 U.S.C. § 158).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* (citing *Pac. Mar. Ass’n v. Local 63, Int’l Longshoremen’s & Warehousemen’s Union (Pacific Maritime)*, 198 F.3d 1078, 1079 (9th Cir. 1999)).

104. 29 U.S.C. § 152.

105. *Clark*, 2017 WL 3641908, at \*2.

106. *Id.*

107. *See id.*, appeal filed, No. 17-35693 (Aug. 26, 2017).

108. *Clark v. City of Seattle*, 899 F.3d 802, 808–13 (9th Cir. 2018) (holding that the drivers did not establish an injury-in-fact concerning their NLRA or First Amendment claims).

second issue is whether regulation of for-hire drivers should occur at the federal, state, or local level.<sup>109</sup>

*A. Preemption and Its Effect on Labor Regulations*

The Supremacy Clause mandates that state and local labor laws yield to federal regulation.<sup>110</sup> State and local governments, however, may promulgate their own labor laws as long as those laws do not interfere with the NLRB's jurisdiction or the Congressional regulation over the unionizing and collective bargaining of employees.<sup>111</sup>

Federal labor law preemption comprises two parts—one based on jurisdiction and the other based on the NLRA occupation of the field of labor relations.<sup>112</sup> The U.S. Supreme Court held in *San Diego Building Trades Council v. Garmon* that the NLRB, rather than state courts, has primary jurisdiction to decide unfair labor practice claims.<sup>113</sup> In *Lodge 76, International Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wisconsin Employment Relations Commission*, the Supreme Court held that the NLRA also preempts state law when Congress intended for the activity to be left to economic forces.<sup>114</sup> Therefore, the NLRA preempts state laws that interfere with the field of labor intended for federal regulation.<sup>115</sup>

The *Garmon* doctrine does not preempt the Seattle Ordinance in *Clark* because the plaintiffs in *Clark* did not allege a valid unfair labor

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109. *Id.*

110. See generally Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972).

111. 29 U.S.C. § 152 (2012).

112. *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers, AFL-CIO v. Wis. Emp't Relations Comm'n (Machinists)*, 427 U.S. 132, 138 (1976).

113. *San Diego Bldg. Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959) ("When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.").

114. *Machinists*, 427 U.S. at 140 ("The Court had earlier recognized in preemption cases that Congress meant to leave some activities unregulated and to be controlled by the free play of economic forces.").

115. *Id.*



practice.<sup>116</sup> Instead, *Clark* implicates the *Machinists* doctrine and asks whether the NLRA preempts the regulation of independent contractors' collective bargaining rights because the NLRA occupies the field of labor relations in general.<sup>117</sup> In *Machinists*, an employer filed an unfair labor practice charge against the union and claimed the union member's refusal to work overtime violated the NLRA.<sup>118</sup> The employer also filed the same charge with the state employment agency.<sup>119</sup> The Supreme Court concluded that the Congressional intent behind the NLRA preempted the state regulatory agency from policing the employer–employee relationship.<sup>120</sup> The Congressional intent underlying NLRA regulation is explicitly stated in the NLRA's language because Congress defined employee and labor organization, excluding independent contractors from coverage.<sup>121</sup> If Congress chose not to include a group of workers, or to specifically exclude a group, the NLRA arguably does not regulate that group.<sup>122</sup>

The Seattle Ordinance does not declare that drivers are independent contractors. Instead, the Seattle Ordinance allows drivers that courts or legislation may later categorize as independent contractors to unionize.<sup>123</sup> If the NLRA governs the regulation of rideshare drivers, the Seattle Ordinance is preempted.<sup>124</sup> If the NLRA does not govern the regulation of rideshare drivers, the Seattle Ordinance may be enforceable but still lends itself to other constitutional arguments, such as First Amendment complications.<sup>125</sup>

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116. *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at \*1 (W.D. Wash. Aug. 24, 2017). The plaintiffs alleged that the city of Seattle violated NLRA §§ 8(e) and 8(b)(4), which prevent unfair labor practices. However, both claims were not yet ripe for suit because the drivers were not represented yet, nor were they engaging in collective bargaining. *Id.*

117. *Id.*; see also *Garmon*, 359 U.S. at 244.

118. *Machinists*, 427 U.S. at 133–35.

119. *Id.*

120. *Id.* at 149–55. “[T]he crucial inquiry [is] whether Congress intended that the conduct involved be unregulated because [it is] left ‘to be controlled by the free play of economic forces.’” *Id.* at 140 (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

121. 29 U.S.C. § 152 (2012).

122. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co. (Brotherhood)*, 394 U.S. 369, 377 (1969).

123. SEATTLE, WA., MUN. ch. 6.310, § 1(A) (2015).

124. 29 U.S.C. § 152.

125. *Id.*; U.S. CONST. amend I. Among others, the First Amendment provides the right to freedom of speech. The Seattle Ordinance may interfere with the drivers' freedom of speech because it arguably forces them into a bargaining unit that may provide opinions on certain issues—some of which the drivers may or may not agree with.

This conclusion, however, is still dependent on whether rideshare drivers are employees or independent contractors.<sup>126</sup>

### 1. *The Split That Causes Polar Opposite Results*

Currently, the Second and Ninth Circuits are split over whether the NLRA's definition of labor organization implicates the *Machinists* doctrine and allows the NLRA to encompass independent contractor bargaining units regardless of the NLRA's exclusion of independent contractors from the definition of employee.<sup>127</sup> Because of this split between the circuit courts, one circuit could deem the Seattle Ordinance constitutional and another unconstitutional.<sup>128</sup>

The Ninth Circuit restricted the definition of labor organization to the NLRA's specific language and refused to expand NLRA coverage to groups beyond the NLRA's definitions.<sup>129</sup> In *Pacific Maritime Association v. Local 63, International Longshoremen's & Warehousemen's Union*, the Ninth Circuit—the controlling circuit for Seattle—had to determine whether there was a violation of the NLRA because of the prohibition on secondary boycotts.<sup>130</sup> The court first had to categorize a “public sector union” for purposes of NLRA coverage.<sup>131</sup> The public sector union in this case was comprised of a group of Los Angeles port pilots who wanted to engage in collective bargaining.<sup>132</sup> The union represented employees of a state employee political subdivision; thus, the union did not represent employees the NLRA covered.<sup>133</sup> The Ninth Circuit held that the Los Angeles port pilots did not constitute an NLRA “labor organization” because the NLRA's labor organization definition only includes

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126. See generally *supra* Part I.B.

127. See *Pac. Mar. Ass'n v. Local 63, Int'l Longshoremen's & Warehousemen's Union*, 198 F.3d 1078, 1079 (9th Cir. 1999); *Marriott In-Flite Servs. v. Local 504, Air Transp. Div., Transp. Workers of Am., AFL-CIO*, 557 F.2d 295, 296 (2d Cir. 1977); see also 29 U.S.C. § 152(5) (defining “labor organization” as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work”).

128. See *infra* Part II.B.

129. *Pacific Maritime*, 198 F.3d at 1081.

130. *Id.*

131. *Id.* at 1081–83. A public sector union is one comprised of state employees or any political subdivision of the state. *Id.*

132. *Id.*

133. *Id.*

employees.<sup>134</sup> The port pilots worked in the public sector and belonged to another group the NLRA definition of employee specifically excluded.<sup>135</sup> The court's decision allowed the port pilots to organize without running into preemption issues with the NLRA; therefore, the court reasoned, the NLRA cannot regulate the unionization of non-employees.<sup>136</sup>

The Second Circuit faced the same secondary boycott prohibition issue but reached the opposite conclusion in *Marriott In-Flite Services v. Local 504, Air Transportation Division, Transportation Workers of America*.<sup>137</sup> The Second Circuit looked beyond the NLRA's language and relied on legislative intent to conclude that groups the NLRA does not define still fall within the definition of "labor organization" and are therefore subject to NLRA regulation.<sup>138</sup> In *Marriott*, an employer sued a local union of airline employees organized under the Railway Labor Act ("RLA"), a federal statute separate from the NLRA, for damages from a secondary boycott.<sup>139</sup> The Second Circuit considered whether this RLA union was a labor organization under the NLRA.<sup>140</sup> The court relied on legislative history behind the 1947 amendments to the NLRA in concluding that the airline employees constituted an NLRA labor organization and therefore the NLRA could regulate them.<sup>141</sup> The court held that the amendment intended to include groups like the airline employee union under NLRA coverage, and therefore there was no preemption issue and the union could be federally regulated.<sup>142</sup> As a result, the airline employees were held to NLRA standards on collective bargaining.

The Ninth Circuit decided *Pacific Maritime* after *Marriott*, noting that its conclusion was different.<sup>143</sup> In highlighting the difference, the Ninth Circuit cited a Supreme Court case that resolved the question of whether

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134. *Id.*

135. *Id.*; see also 29 U.S.C. § 152(2) (2012). The exclusion of public sector employees comes from the definition of employer rather than the definition of employee, whereby the NLRA excludes the U.S. government and any political subdivision from coverage. *Id.*

136. *Pacific Maritime*, 198 F.3d at 1081.

137. *Id.*

138. *Marriott In-Flite Servs. v. Local 504, Air Transp. Div., Transp. Workers of Am., AFL-CIO*, 557 F.2d 295, 296 (2d Cir. 1977).

139. *Id.*

140. *Id.*

141. *Id.* at 298–99.

142. *Id.*

143. *Pac. Mar. Ass'n v. Local 63, Int'l Longshoremen's & Warehousemen's Union*, 198 F.3d 1078, 1079 (9th Cir. 1999).

groups the NLRA's definitions excluded are still considered labor organizations and preempted the group's collective bargaining and unionizing efforts.<sup>144</sup>

## 2. *The Supreme Court's Footnote*

The 1947 amendments to the NLRA excluded independent contractors, as well as others, from NLRA coverage.<sup>145</sup> In *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company*, the Supreme Court stated in a footnote that the 1947 Taft–Hartley amendments to the NLRA “did not expand the scope of ‘employees’ or ‘labor organizations’ whom the [NLRA covers].”<sup>146</sup> This footnote asserted that the NLRA does not govern groups that the NLRA's definition of employee specifically excludes, and therefore the NLRA does not preempt the groups from engaging in collective bargaining activities.<sup>147</sup> Although the Second Circuit relied on legislative history, it ignored the Supreme Court's restrictive interpretation of employees and labor organizations by reasoning that the footnote was mere dicta.<sup>148</sup> The Second and Ninth Circuit split, therefore, revolves around whether the Supreme Court made a binding decision about the preemptive power of the NLRA over excluded groups. Although the principle is located in a footnote, the Supreme Court unequivocally stated its opinion on the labor organization and employee definitions and chose not to expand either.<sup>149</sup> Thus, the Second Circuit should have abided by the Supreme Court's decision.

The Seattle Ordinance at issue in *Clark* addresses independent contractors, a specific group of workers that the 1947 amendments to the NLRA chose to exclude.<sup>150</sup> Under the Ninth Circuit's interpretation, the Seattle Ordinance does not disrupt Congressional intent or the NLRA's statutory language because it only regulates independent contractors the

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144. *Id.*

145. 29 U.S.C. § 152 (2012).

146. *Bhd. of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377 (1969).

147. *Id.*

148. *Marriott In-Flite Servs. v. Local 504, Air Transp. Div., Transp. Workers of Am., AFL-CIO*, 557 F.2d 295, 299 (2d Cir. 1977) (“This ambiguous dictum, contained in a footnote, provides little basis for a major inroad into the national labor policy against secondary boycotts.”).

149. *Brotherhood*, 394 U.S. at 377.

150. 29 U.S.C. § 152.

NLRA does not cover.<sup>151</sup> The Seattle Ordinance governs a group of workers that Congress specifically removed from NLRA coverage, and therefore, the NLRA does not preempt the Seattle Ordinance.<sup>152</sup> Consequently, it is constitutional, and local governments may follow suit by drafting similar labor laws that regulate rideshare drivers as independent contractors.<sup>153</sup>

Similar local regulations, however, will only create confusion for drivers and rideshare companies because they will have to decipher two levels of labor regulation: state or local regulation and the NLRA federal regulation. The workers and rideshare companies will be subject to organization and collective bargaining in some cities, and possibly states, but not in others.<sup>154</sup>

### *B. The Hardest Question Yet: Regulation*

The second issue *Clark* highlights is whether regulation of the rideshare industry should occur at the federal, state, or local level.<sup>155</sup> Labor law commentators and experts heavily debate this issue.<sup>156</sup> Some professors argue that filling in gaps in labor regulation should be left to the states, but others argue that labor regulation should take place at the federal level.<sup>157</sup> Addressing the regulation of rideshare drivers is necessary because Congress passed the federal labor laws before the advent of the gig worker, and the laws have not been amended to account for this new economy.<sup>158</sup> Rideshare drivers have since become an important part of the American workforce; yet the drivers have no protections from employers.<sup>159</sup>

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151. *Pac. Mar. Ass'n v. Local 63, Int'l Longshoremen's & Warehousemen's Union*, 198 F.3d 1078, 1079 (9th Cir. 1999).

152. *See generally* SEATTLE, WA., MUN. ch. 6.310, § 1(A) (2015); 29 U.S.C. § 152. This Comment does not address the market participant exception because Ordinance 124968 is not preempted by the NLRA.

153. *See generally* Paul M. Secunda & Jeffrey M. Hirsch, *Workplace Federalism*, 157 U. PA. L. REV. PENNUMBRA 20 (2008).

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *See generally* Carl Shaffer, *Square Pegs Do Not Fit in Round Holes: The Case for a Third Worker Classification for the Sharing Economy and Transportation Network Company Drivers*, 119 W. VA. L. REV. 1031, 1040 (2017).

159. Molla, *supra* note 12.

*1. State or Local Regulation Succumbs to the Rideshare Companies' Political Power*

Some labor law experts advocate that state or local laws should regulate labor relations by filling in the gaps federal law leaves.<sup>160</sup> Professor Secunda wrote that state law should fill the gaps that federal labor regulation leaves open and play a “complementary role.”<sup>161</sup> Professor Secunda based his argument on the facts that federal regulation takes too long to implement<sup>162</sup> and that states should have the right to regulate employee rights because they can act as laboratories in promulgating workplace laws.<sup>163</sup>

Although the NLRA does not preempt ordinances like the Seattle Ordinance, local regulation of rideshare drivers will result in confusion because of differing regulation for the drivers and rideshare companies per city or state.<sup>164</sup> If every city or state has different regulations, the protections of rideshare drivers would vary and create inconsistencies. Under varying bargaining agreements, drivers would have different pay, hours, and benefits depending on where they work and the terms of the collective bargaining agreement.<sup>165</sup> Seattle rideshare drivers would likely have better working conditions than drivers in a city without labor regulations because the Seattle drivers are able to engage in collective bargaining.<sup>166</sup> This type of regulation creates inconsistencies within the rideshare company and among the drivers because each city or state may subject the company and its drivers to collective bargaining, leading to different pay, hours, benefits, and protections depending on the collective bargaining agreement.<sup>167</sup>

Local regulation of Uber and Lyft could cause the rideshare companies to take their business elsewhere.<sup>168</sup> For example, in May 2016, the city of

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160. Secunda & Hirsch, *supra* note 153, at 29.

161. *Id.* at 22–30.

162. *Id.* at 22. Professor Secunda specifically brings attention to the “current inability of the feds to do anything.” *Id.* at 30.

163. *Id.* at 25.

164. Rudy Takala, *What's the government's role in regulating Uber and Lyft?*, WASH. EXAMINER (May 16, 2016), <http://www.washingtonexaminer.com/whats-the-governments-role-in-regulating-uber-and-lyft/article/2590939> [https://perma.cc/6ZEA-SK2P].

165. *Id.*

166. SEATTLE, WA., MUN. ch. 6.310, § 2 (2015).

167. Takala, *supra* note 164.

168. See Avery Hartmans, *What happened to Austin, Texas, when Uber and Lyft left town*, BUS. INSIDER (June 12, 2016, 8:30 AM), <http://www.businessinsider.com/what-happened-to-austin-texas-when-uber-and-lyft-left-town-2016-6>

Austin passed a local law that required ride-for-hire companies to fingerprint drivers as a hiring practice.<sup>169</sup> Shortly after the law passed, Uber and Lyft left the city because the law restricted how the companies do business.<sup>170</sup> The city held a repeal referendum that allowed citizens of Austin to reconsider the local law.<sup>171</sup> Uber and Lyft advocated strongly against the ordinance because it did not allow the companies to hire their drivers in a timely fashion.<sup>172</sup> Ultimately, Uber and Lyft lost, the Austin law passed, and the rideshare companies left the city.<sup>173</sup>

Some commentators have argued that local regulations are not a problem because Austin had a successful transportation system without Uber and Lyft.<sup>174</sup> One year after the enactment, however, Texas Governor Abbott overturned Austin's regulation, and Uber and Lyft returned to Austin.<sup>175</sup> After Uber and Lyft lost the local repeal referendum, state legislators successfully lobbied the governor to overturn the Austin rideshare regulation after continuous pressure from Uber and Lyft.<sup>176</sup> Although Austin's transportation system survived without Uber and Lyft for one year, the regulation eventually succumbed to rideshare companies' ability to lobby state officials.<sup>177</sup>

Local regulation can cause existing rideshare businesses to leave the city or use their political power to defeat the local legislation.<sup>178</sup> Local regulation causes Uber and Lyft to become defensive and heavily lobby state officials because the rideshare companies dislike local regulations

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[<https://perma.cc/2QTK-QX9Q>] (last visited Feb. 7, 2019); *but see* Stephanie Riegel, *Baton Rouge DUI arrests down nearly 18% in year since Uber entered market*, GREATER BATON ROUGE BUS. REP. (Nov. 2, 2015), <https://www.businessreport.com/business/baton-rouge-dui-arrests-nearly-18-year-since-uber-entered-market-app-deserves-partial-credit-police-chief-says> [<https://perma.cc/MEP7-X6XF>].

169. Hartmans, *supra* note 168.

170. *Id.*

171. Heather Kelly, *Uber and Lyft to leave Austin after losing vote on fingerprinting*, CNN MONEY (May 8, 2016, 9:03 AM), <http://money.cnn.com/2016/05/08/technology/uber-lyft-austin-vote-fingerprinting/index.htm> [<https://perma.cc/K2CC-3LA7>].

172. *Id.*

173. *Id.*

174. Hartmans, *supra* note 168.

175. David Z. Morris, *Uber and Lyft Will Be Back in Austin on Monday*, FORTUNE (May 28, 2017), <http://fortune.com/2017/05/28/uber-lyft-austin-texas-2/> [<https://perma.cc/6PWJ-9RPR>].

176. *Id.*

177. Hartmans, *supra* note 168.

178. *Id.*

that cause policy changes from city to city.<sup>179</sup> Ultimately, the companies dislike inconsistent local regulations and will use political power to lobby legislators until the legislation is defeated.<sup>180</sup> Cities may be able to enforce regulation of rideshare companies, but the rideshare companies have a significant interest in preventing or overcoming local regulation if necessary—as well as the political power to do both.<sup>181</sup>

## 2. *The Upside of Federal Regulation*

Although some scholars argue that city and state laws should govern labor practices, other scholars contend that federal regulation would introduce much-needed uniformity.<sup>182</sup> Federal programs must be “uniform in character”; therefore, regulation on the federal level undoubtedly leads to uniform enforcement and guidelines.<sup>183</sup> In addition to uniformity, the Supreme Court held that state law can sometimes further complicate federal law objectives when the Court faced a preemption issue in *United States v. Kimbell Foods*.<sup>184</sup> In *Kimbell Foods*, the Supreme Court addressed both the preemption and regulation concerns of local or state regulations, based on the fact that state laws may frustrate the intent behind the federal regulation, but held that state law took precedent without a Congressional directive.<sup>185</sup>

Jeffrey Hirsch, a labor and employment professor and extensive labor law author, advocates for federal regulation of employment and labor laws

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179. Harriett Taylor, *What happened in Austin after Uber and Lyft got up and left*, CNBC (Aug. 18, 2016, 12:18 PM), <https://www.cnbc.com/2016/08/18/what-happened-in-austin-after-uber-and-lyft-got-up-and-left.html> [https://perma.cc/6PWJ-9RPR].

180. Morris, *supra* note 175; Kate Irby, *Why New York City's drunk driving accidents have gone way down since 2011*, MIAMI HERALD (Apr. 6, 2017), <http://www.miamiherald.com/news/nation-world/national/article143043959.html> [https://perma.cc/Q7X9-839D]. City or state officials can easily be swayed because Uber and Lyft have proven useful in decreasing DWI charges.

181. Kelly, *supra* note 171.

182. Hirsch, *supra* note 28, at 132–50.

183. *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979) (“Undoubtedly, federal programs that ‘by their nature are and must be uniform in character throughout the Nation’ necessitate formulation of controlling federal rules.”) (quoting *United States v. Yazell*, 382 U.S. 341, 354 (1966)).

184. *Kimbell Foods*, 440 U.S. at 728 (considering whether state law frustrated the federal program objectives).

185. *Id.*



by promoting “vertical integration.”<sup>186</sup> Vertical integration would encompass state law into the federal level.<sup>187</sup> Hirsch argues that the federal government should regulate employment law because federal regulation results in a single standard, creating simplicity and avoiding uncertainty for employers.<sup>188</sup> In the debate about state or federal level regulation, Professor Hirsch argues that federal regulation allows for streamlined rules because there is only one unit of government.<sup>189</sup> Federal regulation allows for straightforward enforcement because a single source of government regulates nationwide problems through one agency.<sup>190</sup>

Because federal regulation results in uniform enforcement, Congress should amend the federal laws that govern collective bargaining rights to include rideshare drivers. The new American workforce of gig workers needs uniform acknowledgment and regulation by Congress.<sup>191</sup> The NLRA amendment should act as the starting point to address rideshare drivers and gig workers in general. With the protection NLRA regulation provides through unions, gig workers do not need to be included in other federal labor laws.<sup>192</sup> Unions, acting as the drivers’ bargaining representative, can provide wage and other employment changes through collective bargaining.<sup>193</sup>

Without federal regulation, rideshare workers will not be protected, and employers will be allowed to make unilateral decisions dependent on the local government’s decision about unionizing.<sup>194</sup> Rideshare companies will continue to settle when faced with lawsuits over the classification and rights of for-hire drivers; however, federal regulation will stop rideshare companies from settling by forcing the companies to address the grievances of drivers through collective bargaining.<sup>195</sup>

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186. Hirsch, *supra* note 28, at 158 (“Vertical integration would occur by replacing all state governance of terminations with exclusive federal authority.”).

187. *Id.* at 99.

188. *Id.* at 132–50.

189. Secunda & Hirsh, *supra* note 153, at 37 (“[P]lacing all authority within one form of government provides a greater opportunity to streamline rules.”).

190. *Id.*

191. MBO Partners, *supra* note 11.

192. WILLIAM N. COOKE, *Evolution of the National Labor Relations Act, in* UNION ORGANIZING AND PUBLIC POLICY: FAILURE TO SECURE FIRST CONTRACTS 1, 1–21 (1985).

193. *Id.*

194. See, e.g., Complaint at 6–9, Van v. Rasier, L.L.C., No. 2:17-CV-02550, 2017 WL 1278763 (C.D. Cal. Sept. 14, 2017).

195. Heather Sumerville, *Judge approves \$27 million driver settlement in Lyft lawsuit*, REUTERS (Mar. 16, 2017, 4:59 PM), <https://www.cnn.com/2017/03/17>

Federal regulation in other areas, such as medical leave, overtime, and wage provisions, has yielded desirable results.<sup>196</sup> Congress passed the Family and Medical Leave Act (“FMLA”) in 1993, allowing workers to take unpaid medical leave without repercussions.<sup>197</sup> Prior to the FMLA, only 34 states had some type of family leave legislation with just 12 of those states providing job-protected medical or family leave.<sup>198</sup> The FMLA’s biggest hurdle was Congressional recognition of the changing American workforce and its need for protection.<sup>199</sup> In the 1980s and 1990s, the workforce change was a “revolutionary influx of women into the workforce.”<sup>200</sup> Women became significant contributors to household income and a vital part of the American workforce.<sup>201</sup> Although states can and do grant greater protections for workers than the FMLA provides,<sup>202</sup> the FMLA supplied an essential federal floor for both the recognition and protection of women as emerging American workers and created uniform federal legislation where state regulation lacked.<sup>203</sup>

Similar to the regulation of family medical leave, the federal government should regulate for-hire drivers to provide uniformity for both the drivers and businesses. Like the influx of female workers in the 1980s and 1990s, recent years have shown an increase in rideshare drivers.<sup>204</sup> Federal regulation of rideshare workers arguably recognizes a new and integral part of the American workforce and provides protections for those workers.<sup>205</sup> The drivers and rideshare companies will know the designated pay, benefits, and union-organizing parameters for all locations rather than

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/judge-approves-27-million-driver-settlement-in-lyft-lawsuit.html [https://perma.cc/C8AT-H7ZD]; see also 29 U.S.C. § 152 (2012).

196. See, e.g., *EPA History*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/history#timeline> [https://perma.cc/ZM7Q-GQ43] (last visited Feb. 7, 2019).

197. 29 U.S.C. § 2615.

198. Jane Waldfogel, *Family leave coverage in the 1990s*, MONTHLY LAB. REV. (Oct. 1999), <https://www.bls.gov/opub/mlr/1999/10/art2full.pdf> [https://perma.cc/A7ZD-JN8T].

199. Donna R. Lenoff & Lissa Bell, *Government Support for Working Families and for Communities: Family and Medical Leave Act as a Case Study*, NAT’L PARTNERSHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/research-library/work-family/fmla/fmla-case-study-lenhoff-bell.pdf> [https://perma.cc/9XCC-C865].

200. *Id.*

201. *Id.*

202. See, e.g., CAL. LAB. CODE § 246 (West 2017).

203. 29 U.S.C. § 2612 (2012).

204. MBO Partners, *supra* note 11.

205. Hirsch, *supra* note 28.

having to decipher the regulation from jurisdiction to jurisdiction.<sup>206</sup> Federal regulation allows drivers and businesses alike to rely on one source of labor regulation rather than the varying laws of countless cities or states.<sup>207</sup>

Additionally, if rideshare drivers can organize and bargain, workers do not need the protections of the Fair Labor Standards Act (“FLSA”), FMLA, and other labor regulations.<sup>208</sup> The drivers can negotiate through unions to protect themselves from potential violations of other labor laws.<sup>209</sup> Congress passed minimum wage and medical leave laws initially because of the large percentage of workers unions do not represent.<sup>210</sup> Drivers’ collective bargaining rights ensure a new class of workers are protected without the promulgation of new law. The solution begins with the NLRA, but it can filter into other employment laws as time passes and the need arises to amend other federal laws.<sup>211</sup>

### III. THE FIRST STEP

There are three possible solutions to the issue of regulating rideshare drivers: (1) to include independent contractors under NLRA coverage; (2) to declare a middle-ground status between independent contractors and employees; or (3) to amend the NLRA to include gig workers in the definition of employee. An NLRA amendment is the best solution because it recognizes the importance of gig workers and provides protections for rideshare drivers.<sup>212</sup>

#### *A. The Inclusion of Independent Contractors*

One solution is to amend the NLRA to once again include independent contractors as employees. In 1947, Congress passed the Taft–Hartley Act, which amended the NLRA to exclude specifically independent

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206. See, e.g., 29 U.S.C. § 2612.

207. Hirsch, *supra* note 28, at 132–50.

208. See generally 29 U.S.C. § 2612; see also Civil Rights Act, Title VII, 42 U.S.C. § 2000(e). Rideshare drivers will be able to combat employer decisions through collective bargaining as opposed to relying on different federal labor statutes for protection. Collective bargaining and their representative union will ensure employees’ grievances are heard and brought to the employer when the union is negotiating. *Id.*

209. See, e.g., RAISE UP UBER, *supra* note 88.

210. See, e.g., 29 U.S.C. § 2615.

211. COOKE, *supra* note 192, at 1–21.

212. See generally Council Directive 2008/104, art. 1, 2008 O.J. (L 327) (EC).

contractors.<sup>213</sup> Congress excluded independent contractors because of the Supreme Court's decision in *United States v. Silk*.<sup>214</sup> In *Silk*, the Supreme Court decided whether coal "unloaders" and truckers were employees or independent contractors; the Court ultimately held that the unloaders were employees and the truckers independent contractors because of their "economic realities."<sup>215</sup> The economic realities test, replacing earlier tests, relies on "economic facts," such as employer control and type of work, to determine whether the relationship is one of employment or an independent business enterprise.<sup>216</sup> After *Silk*, big business advocates lobbied Congress successfully to exclude independent contractors, with Congress relying heavily on the *Silk* economic realities test to decide that independent contractors did not qualify for NLRA protections.<sup>217</sup>

An amendment to the NLRA including independent contractors would be reflective of the recent increase in gig workers.<sup>218</sup> Simply including all independent contractors, however, is nearly impossible. Big businesses benefit from hiring independent contractors, and business owners do not want every independent contractor to have NLRA rights.<sup>219</sup> Independent contractor status allows businesses to avoid employer-provided benefits, taxes, and workers' compensation insurance.<sup>220</sup> The Taft-Hartley amendments that excluded independent contractors were a direct result of big business pressure to balance out the previous NLRA restrictions placed

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213. DAVEY ET AL., *supra* note 39, at 33.

214. Blake E. Stafford, *Riding the Line Between "Employee" and "Independent Contractor" in the Modern Sharing Economy*, 51 WAKE FOREST L. REV. 1223, 1227 (2016).

215. *Id.*

216. NLRB v. Hearst Publ'ns, 322 U.S. 111, 128 (1944) ("[W]hen . . . the economic facts of the relation make it more nearly one of employment than of independent business enterprise . . . those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections.").

217. Stafford, *supra* note 214, at 1227–28.

218. *See generally* 29 U.S.C. § 2612 (2012).

219. Jack Barbash, *Unions and Rights in the Space Age*, U.S. DEP'T LAB., <https://www.dol.gov/oasam/programs/history/chapter6.htm> [<https://perma.cc/4VXU-CLRM>] (last visited Dec. 18, 2018).

220. Stephen Fishman, *Pros and Cons of Hiring Independent Contractors*, NOLO, <https://www.nolo.com/legal-encyclopedia/pros-cons-hiring-independent-contractors-30053.html> [<https://perma.cc/6MSR-HZXY>] (last visited Dec. 18, 2018).

on employers.<sup>221</sup> The amendments aimed to balance the interests of employers with the interest of unions.<sup>222</sup> Additionally, an amendment to the NLRA that includes all independent contractors may not be politically viable because pro-employer and pro-union groups are constantly fighting.<sup>223</sup> NLRA legislation is a consistent push and pull of employer and union efforts to provide the best legislation for the corresponding side.<sup>224</sup> Including all independent contractors could create a domino effect, as the regulation would likely overlap with other federal statutes related to employment, like the FLSA and Title VII. This result would be hard to predict and could affect minimum wage or workplace discrimination.<sup>225</sup>

### *B. Declaring a Middle Ground*

As opposed to including all independent contractors, Congress could declare a hybrid or middle-ground status for gig workers.<sup>226</sup> A hybrid status would land between the classification of employee and independent contractor.<sup>227</sup> “Dependent contractor” status is a middle ground between employee and independent contractor, which allows workers to depend on their employer but still maintain some control over their employment.<sup>228</sup> Recent employment law scholarship proposes that Uber and Lyft drivers should be considered dependent contractors under the FLSA, which provides worker protections such as minimum wage.<sup>229</sup> Declaring dependent contractor status alone, however, does not solve the problem of

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221. Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 CUNY L. REV. 107, 109 (2009).

222. DAVEY ET AL., *supra* note 39, at 33.

223. *Id.*

224. *Id.* In 1947, the Taft–Hartley amendments represented a push by employers to balance out the rights given to unions in the NLRA’s passing. In 1959, the Landrum–Griffin amendments, however, signaled a pull back by unions restricting the rights of employers once again. *Id.*; *see, e.g.*, 29 U.S.C. §§ 152, 153 (2012).

225. *See generally* 29 U.S.C. § 202; 42 U.S.C. § 2000(e).

226. Megan Carboni, *A New Class of Worker for the Sharing Economy*, 22 RICH. J.L. & TECH. 11 (2016).

227. *Id.*

228. Easton Saltsman, *A Free Market Approach to the Rideshare Industry and Worker Classification: The Consequences of Employee Status and a Proposed Alternative*, 13 J.L. ECON. & POL’Y 209, 230–31 (2017) (considering that dependent contractor status would allow workers to have control over employee benefits, such as severance packages, while employers retain control over hours and wages).

229. *Id.*

for-hire drivers' collective bargaining rights.<sup>230</sup> Simply identifying a new type of worker without legislation causes more uncertainty about gig workers' employment status because it is still unclear whether workers in the rideshare industry fit within the NLRA's definition of employee.<sup>231</sup>

### *C. An Amendment to Include Gig Workers*

Instead of including independent contractors or declaring a hybrid category, Congress should amend the NLRA's definition of employee to include gig workers under NLRA protections. Amending the NLRA's definition of employee is the most ideal solution because gig workers are a substantial part of the American workforce. Further, employers can continue to hire independent contractors, and the amendment ends the ongoing classification debate. The NLRA amendment should read: "The term 'employee' shall include any employee, as well as any worker that relies on smartphone applications to complete an on-demand service and may perform this work for a temporary or inconsistent basis."

#### *1. Gig Workers Here to Stay*

This amendment strikes the perfect balance between protecting gig workers and recognizing the benefits employers gain from hiring independent contractors.<sup>232</sup> Including gig workers in the NLRA recognizes a growing part of the American workforce and gives gig workers the chance to effectively defend their rights under labor laws, as well as providing a foundation for protections under other federal labor laws.<sup>233</sup> A study by Intuit predicts that the amount of Americans working in the on-demand economy will double by 2020 with 43% of the American workforce becoming a part of the on-demand economy.<sup>234</sup> The shift in the American job economy toward gig work will continue as more Americans seek the benefits of extra pay from side jobs.<sup>235</sup> Gig workers are a different class of independent contractors from the independent contractors

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230. See generally 29 U.S.C. § 152.

231. Saltsman, *supra* note 228.

232. See *supra* Part II.B.2.

233. See *supra* Part II.B.2.

234. See *supra* Part II.B.2.

235. *Intuit Forecast: 7.6 Million People in On-Demand Economy by 2020*, INTUIT (Aug. 13, 2015), <http://investors.intuit.com/press-releases/press-release-details/2015/Intuit-Forecast-76-Million-People-in-On-Demand-Economy-by-2020/default.aspx> [<https://perma.cc/2RGU-YJRQ>].

contemplated when Congress passed the NLRA.<sup>236</sup> To protect gig workers, the NLRA definition of employee should specifically encompass this growing part of the American workforce.

## 2. *Employers Still Win*

Rideshare companies do not want rideshare drivers to be classified as employees because the status as independent contractors allows the companies to maximize profit.<sup>237</sup> Uber and Lyft's business models rely on drivers being independent contractors because the companies maximize profit by not providing benefits or workers insurance.<sup>238</sup> Additionally, rideshare companies are not liable for payroll taxes or negligent acts by independent contractor drivers.<sup>239</sup> The amendment only includes gig workers under NLRA regulations. Rideshare companies, therefore, may still avoid NLRA regulation and other federal employment regulations—like the FMLA and the FLSA—by hiring drivers specifically deemed as independent contractors.<sup>240</sup> The benefit of hiring independent contractors is why employers passionately lobbied to exclude independent contractors from the NLRA's definition of employee.<sup>241</sup> Amending the NLRA definition of employee to include gig workers still allows employers to hire independent contractors that are not gig workers without repercussions; employers will be restricted only in their treatment of gig workers.<sup>242</sup>

## 3. *NLRA was Always the Starting Point*

Including gig workers specifically in the NLRA definition of employee begins to resolve the dispute over rideshare drivers' classification and is a starting point for protecting gig workers.<sup>243</sup> Congress passed the NLRA to protect private sector rights and later passed the FLSA

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236. *Id.*

237. Fishman, *supra* note 220.

238. Maya Kosoff, *How two lawsuits could destroy Uber and Lyft's business models – and set a precedent for the rest of the sharing economy*, BUS. INSIDER (Mar. 12, 2015, 10:12 AM), <https://www.businessinsider.com/uber-lyft-business-models-and-lawsuits-2015-3> [<https://perma.cc/6UYG-SU5X>].

239. Fishman, *supra* note 220.

240. Taylor English Duma, *Preventing Independent Contractors From Becoming Full-Fledged Employees*, 28 No. 5 GA. EMP. L. LETTER 7 (2015).

241. 29 U.S.C. § 152 (2012).

242. *Id.*

243. *See supra* Part I.B.

and FMLA to address the issues left unprotected by the NLRA.<sup>244</sup> Just as the NLRA laid the foundation to protect private sector workers' rights, the amendment would create protections for America's new class of workers.<sup>245</sup> An NLRA definition of gig workers must be within the definition of employee to fully protect rideshare drivers' collective bargaining rights.<sup>246</sup> An amendment of the NLRA definition gives gig workers a freestanding definition within the classification of employee for purposes of labor rights.<sup>247</sup> Additionally, Congress and states may continue to provide more protection through other statutes.<sup>248</sup>

#### 4. *Mirroring the European Union*

European Union labor laws, in contrast to U.S. labor law, yields a very progressive union-friendly workforce.<sup>249</sup> The European Commission is tasked with promulgating and amending labor laws that provide worker rights and freedoms.<sup>250</sup> The amendment should mirror the objectives behind the European Union's 2008 Directive on Temporary Agency Work ("Directive").<sup>251</sup> The Directive aimed to balance the protections of temporary workers with the reality that employers have specific reasons to employ workers or contract out the work.<sup>252</sup> Congress should amend the NLRA's definition of employee to include "any worker that relies on smartphone applications to complete an on-demand service and may perform this work on a temporary or inconsistent basis." This amendment accomplishes goals similar to those the European Union's Directive achieved.<sup>253</sup> After the European Union passed the Directive, a new type of

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244. COOKE, *supra* note 192.

245. *Id.*

246. *See* 29 U.S.C. § 152.

247. COOKE, *supra* note 192; *see also* 29 U.S.C. § 152.

248. COOKE, *supra* note 192; *see also* 29 U.S.C. § 152.

249. *Employment, Social Affairs, and Inclusion*, EUR. COMMISSION, <https://ec.europa.eu/social/main.jsp?catId=157> [<https://perma.cc/Q3A3-YN6U>] (last visited Feb. 7, 2019).

250. *Id.*

251. *See generally* Council Directive 2008/104, art. 1, 2008 O.J. (L 327) (EC).

252. *Working Conditions - Temporary Agency Workers*, EUR. COMMISSION, <http://ec.europa.eu/social/main.jsp?catId=706&langId=en&intPageId=207> [<https://perma.cc/63UD-YJFT>] (last visited Feb. 7, 2019) ("The Directive aims to guarantee a minimum level of effective protection to temporary workers and to contribute to the development of the temporary work sector as a flexible option for employers and workers.").

253. Council Directive 2008/104, art. 3(1)(c), 2008 O.J. (L 327) (EC). The Directive defines temporary agency worker as "a worker with a contract of



worker was recognized and given significant protections.<sup>254</sup> Likewise, the amendment would allow gig workers to engage in collective bargaining without opening the flood gates to all independent contractors.<sup>255</sup>

Amending the definition of employee to encompass gig workers presents similar political problems as amending the NLRA to include independent contractors.<sup>256</sup> Including gig workers in the definition of employee, however, is the middle-ground. Amending the definition of employee allows for federal regulation of workers that need to be protected but also provides businesses the opportunity to oppose unions through the election process. The amendment would still allow businesses to reap the benefits of employing independent contractors other than gig workers because they remain excluded from NLRA protections. Additionally, gig workers would remain excluded from the protections of other labor laws. Amending the definition of employee to include gig workers is the best solution for solving the labor law preemption and regulatory issues presented in *Clark*.<sup>257</sup> Until then, local ordinances allowing cities to promulgate their own classification of Uber and Lyft drivers are constitutional, and this discrepancy leads to problematic regulation on a city-by-city or state-by-state basis.

#### CONCLUSION

In *Clark*, a Washington district court ruled on a local labor law that was designed to be the first of its kind.<sup>258</sup> The court discussed labor law preemption and regulation issues that have been part of an ongoing national debate. Uber and Lyft drivers represent a new group of “gig workers” who are part of the employee versus independent contractor classification debate and do not have collective bargaining rights or protections.<sup>259</sup> The Seattle Ordinance, however, represents a local measure that successfully created a workaround for the misclassification debate that allowed drivers who are independent contractors to engage in collective

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employment or an employment relationship with a temporary-work agency with a view to being assigned to a user undertaking to work temporarily under its supervision and direction.” *Id.*

254. *Id.*

255. *Id.*

256. *See supra* Part II.A.

257. *Clark v. City of Seattle*, No. C17-0382RSL, 2017 WL 3641908, at \*1 (W.D. Wash. Aug. 24, 2017).

258. *Id.*

259. *Intuit Forecast*, *supra* note 235.

bargaining and unionizing.<sup>260</sup> No matter what classification ride-for-hire drivers are given, therefore, the drivers can engage in collective bargaining and union representation.

The best solution to the regulation issue concerning rideshare drivers is to amend the NLRA's employee definition to include gig workers. An amendment would recognize a growing part of the American workforce, allow employers to continue benefitting from hiring independent contractors, and end the ongoing debate concerning whether rideshare drivers are employees or independent contractors.<sup>261</sup> The amendment would accomplish two important goals: recognition of the new workforce and the opportunity for drivers to engage in collective bargaining to protect themselves from adverse employer decisions.

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260. See generally SEATTLE, WA., MUN. ch. 6.310 (2015).

261. *Intuit Forecast*, *supra* note 235; see also Frost, *supra* note 15, at 4.

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